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Issue Date: 05 October 2006

CASE NO.: 2006-LHC-01810

OWCP NO.: 01-159379

In the Matter of

D.C.[1]
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

Appearances:

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.).
Groton, Connecticut for the Claimant

Edward W. Murphy (Morrison Mahoney LLP),
Boston, Massachusetts for the Employer

Before: Daniel F. Sutton, Administrative Law Judge

DECISION AND ORDER ON REMAND DENYING MODIFICATION

I. Statement of the Case

This matter arises from a claim for disability and medical benefits under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "LHWCA" or "Act"). In the proceeding, D.C. (the "Claimant"), a shipyard worker, brought a claim against his former employer, Electric Boat Corporation ("EBC" or the "Employer"), for disability and medical benefits, alleging that his malignant fibrous hystiocytoma arose out of work-related injuries during his course of employment at EBC. On May 16, 2001, the Claimant suffered a work-related knee injury that required surgery. On September 15, 2003, the Claimant

[1] In accordance with Claimant Name Policy which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. *See* Chief ALJ Memorandum dated July 3, 2006 available at http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF

struck the same knee on a chair at work and eventually sought treatment for lingering pain. This led to his diagnosis of cancer, a second surgery and a period of disability for which he filed a claim for benefits under the LHWCA. On October 27, 2005, I issued a Decision and Order denying disability and medical benefits (hereinafter "D&O Denying Benefits") to the Claimant based on my finding that the Claimant had failed to establish by a preponderance of evidence that his cancer arose out of and in the course of his employment at EBC. On November 3, 2005, the Claimant filed a Motion for Reconsideration, arguing that I had failed to consider an alternate theory of causation, and EBC responded in opposition on November 14, 2005. On December 20, 2005, I issued a Decision and Order Denying Claimant's Motion for Reconsideration (hereinafter "D&O Denying Recon.") on the ground that the alternate causation theory had not been untimely raised. The Claimant appealed to the Benefits Review Board ("BRB"), but on February 14, 2006, he requested that the BRB remand the case to this court for the submission of new evidence showing that he had consistently put forward both causation arguments. By order dated May 5, 2006, the BRB granted the Claimant's motion for remand; *C.G. v. Electric Boat Corp.,* BRB No. 06-330, Case No. 2004-LHC-02737 (May 5, 2006) (unpublished); and on August 7, 2006, the Claimant filed a motion for modification and to enlarge the record. Thus, the matter is now properly before me for adjudication of the Claimant's motion for modification of the prior denial of benefits.

II. Findings of Fact and Conclusions of Law

A. The Original Decision

In the original Decision and Order, I found that the Claimant was not entitled to an award of benefits based on the opinion of Kenneth A. Kern, M.D., a board-certified surgeon who is a clinical professor of surgery at the University of Connecticut School of Medicine and a Senior Attending Surgeon in general and oncologic surgery at the Hartford Hospital. D&O at 5. Dr. Kern concluded that the Claimant's cancer was not related to his prior surgery. *Id.* at 11. Dr. Kern stated that while external examination suggested that the Claimant's cancer was in nearly the same location as his earlier surgery, anatomically the cancer was in a separate location. *Id.* at 5-6. Dr. Kern also persuasively explained established that the Claimant's cancer, located in the tibia, could not have been caused by scar tissue left by surgery. *Id.* at 5-6. Although the Claimant introduced medical reports from treating doctors who opined that his cancer was related to scar tissue from the prior surgery, I concluded that Dr. Kern's opinion was more thoroughly reasoned and better supported by the objective medical evidence. *Id.* at 10-11. Accordingly, the claim for disability or medical benefits was denied. *Id.* at 11.

B. The Motion for Reconsideration

In his Motion for Reconsideration, the Claimant argued that his alternate theory of causation, namely, that his cancer was caused by the September 15, 2003 injury, was not addressed in the Decision and Order Denying Benefits. In response, EBC argued that the Claimant's own testimony, as well as the medical evidence, contradicted his second theory of causation. Upon review of the record, I found that the Claimant had full access to all medical information and ample opportunity to raise his alternate theory of causation in a timely manner but failed to do so until his post-hearing brief. D&O Denying Recon. at 3-4. Noting that the

Claimant had neither argued a change in law nor presented any new evidence, I concluded that the new theory of cancer causation was not raised in a timely manner and denied the motion for reconsideration. *Id.*

C. The Claimant's Motion for Modification and to Enlarge the Record

The Claimant now seeks to modify the prior denial of his claim for benefits. As supporting evidence, he has offered the Form LS-203 that he filed with the Office of Workers' Compensation Programs ("OWCP") on December 17, 2003. The Claimant argues that the Form LS-203 put EBC on notice of the second theory of causation. He further argues that at the hearing there was a dispute between the parties over whether the date of the injury was May 16, 2001 or September 15, 2003, and that this dispute provided EBC with sufficient notice of the second theory of causation. Thus, the Claimant asserts that the Court mistakenly found that he had not presented the second theory of cancer causation prior to fling his post-hearing brief. Regarding the merits of his claim, the Claimant contends that pursuant to Section 20(a) of the LHWCA, he is entitled to a presumption of causation because he showed that he suffered a harm (*i.e.*, cancer), that working conditions existed (*i.e.*, the knee-chair collision on September 15, 2003) which could have caused or contributed to the harm. He additionally contends that as EBC failed to rebut this second theory of cancer causation, his claim for benefits should be granted.

D. EBC's Opposition

EBC opposes modification, contending initially that this court already considered and rejected the very arguments that the Claimant has raised in his motion for modification. The Employer next argues that the Claimant never raised his second theory of causation until the post-trial briefs, at which point the argument was untimely. The Employer further argues that the Claimant has not established a *prima facie* case, as he has not established that he suffered any harm as a result of the September 15, 2003 incident. Finally, EBC asserts that even if the Claimant had successfully invoked the Section 20(a) presumption, the medical evidence introduced by both parties adequately rebuts any presumed causal link between the September 15, 2003 accident and the subsequently discovered cancer.

E. Discussion

Section 22 of the Act permits any party-in-interest to request modification of a compensation award within the one year of the last payment of compensation or rejection of a claim on grounds that there had been a change in condition or a mistake in a determination of fact. 33 U.S.C. § 922. The modification procedure established by Section 22 provides broad discretion to correct mistakes of fact, whether they are demonstrated by wholly new evidence, cumulative evidence, or merely by further reflection on the evidence initially submitted. *O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 254, 255-256 (1971) (*O'Keefe*); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 276 (2nd Cir. 2003). Although Section 22 has been expansively interpreted as a vehicle for ensuring that the interests of justice are served, it does not provide parties with an unlimited opportunity to reopen a prior award or denial whenever they find themselves dissatisfied with the outcome of prior litigation. Thus, "an allegation of

mistake should not be allowed to become a back door route to re-trying a case because one party thinks he can make a better showing on the second attempt. . . [t]he congressional purpose in passing the law would be thwarted by any lightly considered reopening at the behest of [a party] who, right or wrong, could have presented his side of the case at the first hearing and who, if right, could have thereby saved all parties a considerable amount of expense and protracted litigation." *McCord v. Cephas*, 532 F.2d 1377, 1380-1381 (D.C. Cir. 1976) (*McCord*) (quoting 3 Larson, Workmen's Compensation Law, § 81.52).

The Claimant argues that there was a mistake of fact when the Court previously found that he presented his second theory of causation for the first time in his post-hearing brief. In support, the Claimant moves to admit admitting the Form LS-203 that he originally filed with the OWCP on December 17, 2003 to show that EBC was on notice of the second theory of causation from the very start of the claim. He also contends that he raised the September 15, 2003 chair causation theory in his pre-hearing statement and at the hearing. Upon review of the record, I find that there was no mistake in the prior determination that the Claimant first raised the alternate causation theory in his post-hearing brief and that his current motion for modification constitutes an inappropriate "back door" attempt to relitigate a previously determined fact contrary to the interests of justice. I further conclude that even if it is assumed that the Claimant presented the September 15, 2005 chair causation claim in a timely manner, thereby invoking the Section 20(a) presumption, EBC has presented substantial evidence to rebut the presumption, and a preponderance of the evidence fails to establish that the September 15, 2003 accident caused, contributed to, aggravated or hastened the Claimant's cancer.

1. When did the Claimant introduce his second theory of Causation?

The Claimant asserts that he raised the second theory of causation in his pre-hearing statement. In the relevant part, the pre-hearing statement reads as follows:

> Claimant had a work related left knee injury on 5/16/2001 and subsequently had surgery on it. He continued to have pain in that knee. On 9/15/2003, he hit his left knee while at work and diagnostic tests showed he had a malignant fibrous histocytoma. Claimant asserts that this tumor developed out of the surgical scar tissue.

ALJ Ex. No. 16. While the pre-hearing statement does refer to the September 15, 2003 incident, it clearly did not articulate the second theory of causation. Rather, the Claimant explicitly asserts only the first theory of causation, namely that the cancer developed out scar tissue caused by the earlier surgery. Therefore, I find that the Claimant did not raise his alternate causation theory in his pretrial statement.

The Claimant also asserts that he raised the second theory of causation during the hearing. The September 15, 2003 chair incident was mentioned several times during the hearing, but it was never identified as an alleged cause of the cancer or even an aggravating factor. In this regard, EBC's attorney noted during a discussion of the injury date that, "[t]he 2003 injury . . . yields a much higher average weekly wage [but] the Claimant's experts were attempting to link the cancer to the May 16, 2001 injury date." Oct. 27, 2005 Hearing Transcript ("TR") at 16.

Thus, it is clear that EBC understood the Claimant's references to the September 15, 2003 chair incident as relevant to the Claimant's position on the applicable average weekly wage, and not as an allegation that the September 15, 2003 incident was somehow causally related to the subsequently discovered cancer. TR at 14-16. Moreover, the Claimant himself testified that he believed the cancer was a result of the prior surgery, and he never mentioned any allegation that his collision with the chair on September 15, 2003 aggravated or accelerated the cancer, even when questioned by the Court regarding the alleged cause of the cancer. TR 42-44. No medical evidence was introduced to support a causal link between the September 15, 2003 incident and the cancer, and the Claimant's attorney never clarified the claim as alleging the September 15, 2003 injury as a causative factor in the development of the Claimant's cancer. I therefore find that the Claimant did not present his second theory of causation at the hearing.

2. The Form LS-203

The Claimant argues that the Form LS-203 put EBC on notice of the second theory of causation, and so should be admitted at this late date. If the Claimant was seeking to admit new evidence that was not available at the time of the first hearing on the case, the new evidence would be admissible, and reconsideration would be appropriate. *See Delay v. Jones Washington Stevedoring*, 31 BRBS 197, 204-205 (1998). In *Delay*, the employer wished to have admitted the result of a labor market survey to rebut the *prima facie* case of total disability the claimant had presented. *Id.* at 202. The labor market survey could only be completed after a medical exam, and the claimant did not inform the employer of the results of the exam until after the hearing. *Id.* The BRB held that the evidence should be admitted, as the evidence was not available until after the hearing. *Id.* at 204-205. Here, however, the Form LS-203 was available to the Claimant at the time of the hearing, clearly distinguishing this case from *Delay*. Since the Claimant has offered no explanation for his failure to previously introduce the Form 203, I find that his attempt to do so now amounts to a misuse of the modification procedure which does not provide a party with a back door route to retry a case. *See O'Keeffe*, 404 U.S. at 255-56; *Kinlaw v. Stevens Shipping and Terminal Co*., 33 BRBS 68 (1999).

Moreover, even if the Form LS-203 was admissible, the form is at best ambiguous. The form states "[t]rauma to the left knee - - aggravation of prior knee injury causing sarcoma to light up." Cl.'s Proposed Ex. 16. This statement could be read as suggesting that the Claimant suffered some unspecified trauma to his knee after the original injury and that this second trauma contributed to the development of cancer. However, the statement could also be read as an assertion that the subsequent trauma aggravated the earlier injury and caused the cancer to be discovered which is not the same as alleging that the subsequent trauma aggravated or accelerated the cancer. EBC states that it reasonably relied on the Claimant's pre-trial statement as a clarification of the issues to be addressed and that it thus believed the latter interpretation was correct. Opp'n of Electric Boat Corp. to Cl.'s Mot. for Modification and to Enlarge the R. at 8. In light of the Claimant's representations in the pre-hearing statement and at the hearing that his claim was based on an allegation that the scar tissue from the prior surgery caused or contributed to the cancer, which is the only causation theory on which he introduced medical evidence, I find the ambiguous statements in the Form 203 were insufficient to raise the alternate theory of causation based on the September 15, 2003 collision with the chair.

3. Invocation of the Section 20(a) Presumption and Rebuttal

Pursuant to Section 20(a) of the LHWCA, the Claimant asserts that he presented sufficient evidence to establish a *prima facie* case that his cancer arose out of his employment, creating a presumption of causation which EBC failed to rebut. 33 U.S.C. § 920(a). To invoke the presumption, the Claimant must show "(1) [he] suffered a harm and (2) that conditions existed at work, or an accident occurred at work, that could have caused or aggravated or accelerated the condition." *Conoco, Inc. v Dir., OWCP*, 194 F.3d 684, 687 (5th Cir. 1999). Once a claimant has invoked the Section 20(a) presumption, in order to avoid liability an employer must respond with substantial evidence that the harm suffered was not work related. *Id.* at 687-688. If the Employer is able to rebut the presumption, the court must weigh all of the evidence to determine whether the injury was work related. *Id.* at 690.

Here, the Claimant suffered an injury that led to increased pain in his left knee while he was at work. That by itself is enough to invoke the Section 20(a) presumption; as the Claimant notes, he does not have to demonstrate that the underlying disease was accelerated in any way by the injury. However, the Employer presented Dr. Kern's opinion that trauma can cause the type of cancer the Claimant suffers from, but only chronic trauma experienced over an extended period, not through a single bump to the knee. Ex. 23. The Employer also presented Dr. Kapur's opinion that "[the September 15, 2003] injury did not cause or accelerate [the Claimant's] diagnosis of malignant fibrous hystiocytoma, in fact it probably aided in early diagnosis of the same." Ex. 17. Contrary to the Claimant's assertion that Dr. Kapur's statement is self-contradictory, it is clear that the first use of the word "diagnosis" is synonymous with "condition," while the second use of the word "diagnosis" is synonymous with "discovery." Thus, while I continue to affirm my finding that the Claimant did not state his second theory of causation in a timely manner, I find that the Employer was able to rebut the Section 20(a) presumption through the opinions of Drs. Kern and Kapur.

As the Claimant has invoked the Section 20(a) presumption, and the Employer has presented evidence to rebut the presumption, I must weigh the evidence. The Claimant has admitted that he has provided no "affirmative medical evidence that the working conditions in fact, caused the harm." Reply to Resp't's Opp'n to Cl.'s Mot. for Modification and to Enlarge the R. at 1 (Sept. 13, 2006). Therefore, I find that the trauma the Claimant suffered on September 15, 2003 led to the discovery of his cancer, but it did not cause, aggravate, or accelerate the condition.

III. Order

Based on the foregoing findings of fact and conclusions of law, the Claimant's motion for modification is DENIED, and my prior orders in this case are AFFIRMED.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge